No. 87-631

Supreme Court, U.S.
FILED
NOV 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE COASTAL CORPORATION, *et al.*,

Petitioners,

– against –

APEX OIL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Counter-Statement of the Case	2
Reasons for Denying the Petition	11
I. The Petition Presents No Issue Upon Which Certiorari Should Be Granted, But Rather Seeks A Judicial Re-Evaluation Of The Evidence Presented	11
1. Because *Monsanto* And *Matsushita* Were Properly Applied As To Petitioners, The Decision Below Is Consistent With The Rulings Of This Court And Decisions Rendered By Other Courts Of Appeal	12
2. Petitioners Obvious Purpose Is To Engage This Court In A Lengthy Re-Evaluation Of The Evidence Considered Below	15
3. Petitioners Seek Review Of A Denial Of Summary Judgment That Does Not Preclude Them From Presenting Their Arguments To A Jury Or To The Courts Following Any Adverse Judgment	16
II. The Court Of Appeals' Decision Is Wholly Consistent With The Decision In *Bourjaily*	17
Conclusion	19

TABLE OF AUTHORITIES

Cases:	Page
Anderson v. Liberty Lobby, Inc., 477 U.S. 574, 106 S. Ct. 2505 (1986)	15-16
Bourjaily v. United States, ____ U.S. ____, 107 S. Ct. 2775 (1987)	15, 17, 18
Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R. Co., 398 U.S. 327 (1967)	16
Estelle v. Gamble, 429 U.S. 97 (1976)	16
Glasser v. United States, 315 U.S. 60 (1942)	17
Hamilton - Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916)	16
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 574 (1923)	14
Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986)	*passim*
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)	*passim*
Oregon Fish and Wildlife Dep't v. Klamath Tribe, 473 U.S. 753 (1985)	14
United States v. National Bank of Commerce, 472 U.S. 713 (1985)	14
United States v. Nixon, 418 U.S. 683 (1974)	17

	Page
Constitutional and Statutory Provisions:	
7 U.S.C. § 6b (Commodity Exchange Act § 4b) . .	2
7 U.S.C. § 7a(8) (Commodity Exchange Act § 5a(8))	2
7 U.S.C. § 7(d) (Commodity Exchange Act § 5(d))	2
7 U.S.C. § 13(b) (Commodity Exchange Act § 9(b))	2
7 U.S.C. § 13c(a) (Commodity Exchange Act § 13(a))	2
15 U.S.C. § 1 (Sherman Act)	2
15 U.S.C. § 2 (Sherman Act)	2
New York Gen. Bus. Law § 340 (McKinney 1968)	2
Federal Rule of Evidence 104(a)	17
Federal Rule of Evidence 801(d)(2)(E)	17
Other:	
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986)	14

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Apex Oil Company[1] ("Apex") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by petitioners in this matter.

[1] Apex Oil Company is a Missouri general partnership and, thus, has no parent company. The general partners are two Missouri corporations: Novelly Oil Company ("Novelly") and Goldstein Oil Company ("Goldstein"). Novelly has no parent company. The parent company of Goldstein is S.C.R. Investment Company. Apex Oil Company, Novelly and Goldstein have no subsidiaries (except wholly owned subsidiaries) or affiliates as those terms are used in Supreme Court Rule 28.1.

Counter-Statement of the Case

1. *Preliminary Statement.* -- Apex commenced this action in March 1982 against the petitioners and others[2] alleging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), Sections 5(d), 5a(8), 4b, 9(b) and 13(a) of the Commodity Exchange Act (7 U.S.C. §§ 7(d), 7a(8), 6b, 13(b) and 13c(a)), Section 340 of the New York General Business Law (McKinney 1968) and the common law.

Apex's amended complaint alleges that, commencing no later than February 1, 1982, the long defendants engaged in a concerted attempt to manipulate the market for No. 2 oil in New York Harbor (14a-16a). Seeking to accomplish collectively that which could not be achieved individually, the long defendants conceived of, and implemented, a scheme for the early nomination of, and, thereafter, continued early demand for, No. 2 oil deliverable during February 1982 in New York Harbor, pursuant to February contracts for No. 2 oil ("February Contracts") *(Id.)*. This scheme had the purpose, and effect, of artificially raising the price of No. 2 oil, thereby allowing the long defendants to achieve supracompetitive profits (*Id.*).

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[2] For the convenience of the courts below, the defendants were divided into two groups. The "long defendants" are: (i) Joseph DiMauro ("DiMauro"); (ii) Triad Petroleum, Inc. ("Triad"); (iii) TIC Commodities, Inc. ("TIC"); (iv) The Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New Jersey, Inc. and Belcher New England, Inc. (collectively "Belcher"); (v) Stinnes Corporation and Stinnes Interoil, Inc. (collectively "Stinnes"); (vi) Eastern of New Jersey, Inc. ("Eastern"); (vii) Northeast Petroleum Corporation and Northeast Petroleum Industries, Inc. (collectively "Northeast"); and (viii) George E. Warren Corporation ("Warren"). Also included is former defendant Global Petroleum Corporation ("Global"). The "exchange defendants" are: (i) the New York Mercantile Exchange ("Exchange"); and (ii) Julian Raber ("Raber"), Vice Chairman of the Exchange.

Certain defendants, including Global, were dismissed from the case prior to these proceedings pursuant to stipulations and, in one case, pursuant to court order. Two other defendants, Northeast and Warren, settled with Apex on appeal, one following oral argument and the other following entry of the Court of Appeals' decision and judgment.

After discovery, the defendants filed six motions for summary judgment, collectively encompassing each of the claims asserted in the amended complaint. The District Court granted summary judgment on all claims, and it therefore entered judgment dismissing the amended complaint.

The Court of Appeals affirmed in part, reversed in part and remanded. The court found a triable issue of conspiracy among Global, Northeast and Belcher, but affirmed the District Court with respect to the other defendants.[3] In so ruling, it found the following facts to be undisputed.

2. *Record Evidence.* -- The rules of the Exchange provided that any February Contracts not liquidated by Friday, January 29, 1982 -- the close of trading for such contracts -- would be matched long with short (10a). At the close of trading, Apex was short 4,378 contracts. Of the 4,906 February Contracts open at the close of trading, 1,945 were held by the long defendants, or their affiliates (10a-11a).[4]

On February 1, 1982, as required by the rules, Apex designated delivery sites for all of its February Contracts (11a). Following past practice, GATX terminal in Carteret, New Jersey, was initially designated for 4,281 contracts (*Id.*, 23a). BP Terminal at Tremley Point, New Jersey, was designated as the delivery site

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[3] That portion of the Court of Appeals' opinion and judgment affirming the District Court is the subject of a Petition for a Writ of Certiorari filed with this Court on behalf of Apex on October 17, 1987. *Apex Oil Company v. DiMauro, et al.*, No. 87-633 (hereinafter referred to as "Apex Petition").

[4] These contracts were held as follows:

Northeast	748
Global	362
Belcher	315
Stinnes	300
Warren	170
Eastern	50

for the remaining contracts[5] (*Id.*). On the same day, pursuant to Exchange rules, each long defendant submitted "Notice of Intention to Accept Petroleum Products Futures." The Clearing House then matched up longs and shorts for delivery (11a-12a).

All but 15 of the open long positions held by the long defendants were designated by the Exchange for delivery by Apex (12a). The Exchange rules then required each long to nominate a delivery date and method by 4:30 p.m. on the 5th business day of the month, here February 5, 1982 (*Id.*). The first day for which delivery could be sought was February 6, 1982 (*Id.*).

Prior to February 1982, the nominations by holders of long positions typically sought delivery throughout the month (11a-13a). Moreover, it was not unusual for long and short parties to be flexible in the actual timing and location of delivery. Even in December and January, when, as in February, the market price of No. 2 oil was falling (23a-24a), none of the long defendants bunched their nominations together during the first few delivery days (12a). In addition, they observed industry practice and changed their initial nominations when necessary to facilitate delivery by reasonably spreading deliveries throughout the month (*Id.*). As the Court of Appeals noted, by way of example,

> in December 1981 and January 1982, the nominations of the long defendants were spread fairly evenly throughout each month. The actual delivery dates differed from the nominated dates for roughly two- thirds of the nominations. The actual delivery method was changed in two-thirds of the nominations. The actual location for delivery differed in nearly one-third of the nominations.

(12a).

This pattern was broken in February 1982 (13a). It is undisputed that the long defendants nominated a large number

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[5]As in prior months, Apex designated a limited portion of its delivery obligations from the BP Terminal to facilitate truck deliveries (46a).

of contracts for the first few delivery days (*Id.*). In over 75% of these nominations, delivery was demanded for one of the first three delivery days (23a- 24a). Significantly, only 19% of the long positions held by non- defendants were nominated for this period (*Id.*). Further, the Court of Appeals' own calculations indicated "that while over half of the contracts held by defendants were nominated for the first day of delivery, only about 10% of contracts held by nondefendants were nominated for the first day"(13a).

On February 3, a broker representing several long interests passed along a rumor on the floor of the Exchange that Apex would not be able to make delivery, and, that afternoon, when the Exchange Control Committee met to resolve any market problem, he appeared before the Control Committee, repeated the rumor and stated that, " 'one or two' of his customers were 'out to get Apex' " (13a). Similar rumors circulated among a number of other brokers and oil companies *(Id.)*.

When Apex's initial expectations of sufficient oil at GATX to meet the extraordinary number of nominations were frustrated, it requested changes in delivery dates, methods or sites. The Exchange also requested, but did not require, changes in delivery dates and sites. All of these requests were either ignored or rejected by the long defendants. As a result of this inflexibility, Apex was forced to purchase oil from the long defendants at inflated prices in order to meet its delivery obligations. As the Court of Appeals stated, "there is evidence that while the closing price for February contracts was 89.7¢ per gallon, Apex paid prices as high as 97.5¢ per gallon to several long defendants for oil that was immediately delivered back to the long defendants to satisfy Apex's delivery obligations. These purchases of oil enabled Apex to avoid a default" (14a).

3. *The Opinion and Judgment Below.* -- The Court of Appeals began its analysis by noting that "the . . . grant of the [summary judgment] motions was founded upon the district court's perception of a lack of evidence of a conspiracy" (16a).

The Court of Appeals therefore "focus[ed] primarily on . . . whether there is an issue of fact as to the existence of a conspiracy" (*Id.*).

The court recognized that " 'conduct as consistent with permissible conduct as with [an] illegal conspiracy does not, standing along, support an inference of antitrust conspiracy' " (17a, *quoting Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, ____, 106 S. Ct. 1348, 1357 (1986)). Instead, "[t]here must be some evidence that 'tends to exclude the possibility that the [defendants] were acting independently' " (*Id., quoting Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)). "Thus, evidence of parallel conduct alone cannot suffice to prove an antitrust conspiracy" (*Id.*).

The Court of Appeals then examined this Court's decision in *Matsushita*, which established that "[i]f the scheme alleged is implausible, a conspiracy must be proved by strong direct or strong circumstantial evidence, and the implausibility of a scheme will reduce the range of inferences that may permissibly be drawn from ambiguous evidence" (18a). The court observed "that the conspiracy alleged herein seems plausible, as evidenced by the apparent ability of some defendants to sell oil to Apex at prices significantly over market" (*Id.*).

Concluding that the scheme was plausible, the court next examined "whether on the evidence presented it could reasonably be concluded that the higher prices came about as a result of a conspiracy, rather than through independent action of the defendants" (*Id.*). Having recognized that parallel conduct alone is not enough, the Court of Appeals considered the existence of certain "plus" factors identified by Apex -- motive to conspire and a high level of interfirm communications. The court explicitly recognized that "such factors in a particular case could lead to an equally plausible inference of mere interdependent behavior, i.e., actions taken by market actors who are aware of and anticipate similar actions taken by competitors, but which fall short of a tacit agreement." It observed that "[i]n such a case, a court might find it difficult to hold that the parallel acts 'tend to exclude the possibility' of independent action" (20a).

The Court of Appeals then proceeded to consider what it termed "the strongest evidence of a conspiracy offered by Apex" (22a). This consisted of certain entries in a notebook kept by an official of Northeast memorializing a telephone conversation on February 3 between Fred Slifka, an officer of Global, and another Northeast official. The entry reads:

> *DAO*
>
> Re Merc Nominations
>
> (1) All nominations in writing
>
> (2) If not accepted, NPC [Northeast] to demand $100/contract/day penalty for 5 days
>
> At end of five days window NPA to demand 10 pct penalty + oil plus go to court
>
> (3) NPC to go to newspaper and expose exchange
>
> (4) All loadings must be GATX
>
> [Portion obliterated].

(22a).

The court stated, "[u]nder the circumstances herein, we believe a reasonable inference could be drawn that this notebook entry evidences an agreement between Slifka of Global and Oliver of Northeast to take the actions set forth in it" (22a). It rejected the District Court's conclusion "that since Apex itself picked GATX as the place of delivery, 'it is more likely' that the conversation was a natural one between traders faced with the possibility of an Apex default on deliveries; that it was merely a discussion of shared concerns" (*id.*), reasoning that "there was some evidence indicating that Apex has not in the past been held to its initial selection of a delivery site," and, further, "that if these two parties truly were concerned primarily with early delivery of the oil, a better way to ensure delivery might have been to show some flexibility as to the mode and place of delivery" (23a).

The Court of Appeals also expressly disagreed with the District Court's acceptance of "the long defendants' assertion that since the price of No. 2 oil was falling at the time the nominations were made, no issue of fact could exist as to the motivation behind the early nominations [because in the defendants' view,] it was sensible to accept the oil early so that a higher price could be charged on resale" (*Id.*). It reasoned:

> [A]ssuming prices were falling, it was not inevitable that early nomination would be advantageous. For example, it would not have made sense to incur storage costs if fairly rapid resale was not feasible. A table compiled by the long defendants indicates that for *all* long positions in February 1982 No. 2 oil contracts, defendant and nondefendant, only about 30% of all nominations specified the first two days of the delivery period. Our calculations, based upon apparently undisputed compilations submitted by Apex, of the number of nominations for each day made by each long defendant, indicate that over 60% of the long defendants' nominations were for the first two days (over 75% for the first three days); and approximately 65% of Global's nominations were for the first two days (100% in the first three days). While only about 10% of Northeast's nominations were for the first two days, over 55% were for the first three days. The nondefendant longs nominated only 15% of their contracts for delivery for the first two days (19% in the first three days). In fact, it appears that the nondefendant longs nominated at most 23% of their Apex contracts for the first three days. It therefore seems clear that not all holders of long positions in oil contracts in a climate of falling prices saw fit to take delivery early, even with respect to those contracts to be delivered by Apex. Indeed, some evidence indicates that in the two months prior to February 1982, No. 2 oil prices may have been dropping, albeit not as rapidly. In those months, very few contracts were nominated early by holders of long positions

(23a-24a). Thus, the Court of Appeals concluded that "in light of the incriminating nature of the notes regarding the telephone conversation, since we must draw reasonable inferences in favor of Apex, we conclude that the finder of fact should decide whether the denial of conspiracy by the defendants should be accepted" (24a).

The Court of Appeals did not reverse as to Global and Northeast, since the case against them had been settled. The court found the evidence of their activities relevant, however, to interpreting additional communications among these defendants and Belcher.

The court next examined several entries in the notebook of a Belcher official, William Berberich.

> On February 3, Slifka of Global spoke to Berberich. In his notebook for that day, Berberich entered Slifka's name and telephone number, followed by, "1) G.E. Warren. 150. 2) Sent Wires and Want Immediate Answer. 3) Threatened WS [illegible]." Two pages later in the notebook, on the same date, an entry reads:
>
> -- Penalty to start Fri. --
>
> -- 10% after 5 days --
>
> -- oil at 5 days --
>
> -- Bring suit against exchange
>
> -- Restraining order to prevent any further trades on Merc

(26a).

The Court of Appeals found the similarity between the Berberich notes and the notes of the Global and Northeast communication "striking" (27a). It stated that these notes would permit a finder of fact to infer Belcher's participation in the conspiracy between Global and Northeast, especially if viewed in light of handwritten notations, concerning a trader at Northeast, made by an officer of Belcher two days earlier to the effect that Belcher would "Demand *delivery*" (emphasis in original), "Look for Default" and "Merc - EFP" (24a). Several pages later, in another notation for February 1, the notebook reads, "Sat.

demand 12:01 Sat. [February 6] AM"; and in notations for February 2 appear the words "promote crunch" and "press for default" (24a-25a).

The Court of Appeals stated:

> In our view, the similarity between the notes seems striking. If a finder of fact were to infer a conspiracy between Global and Northeast, a possibility we have concluded would be reasonable in light of Denihan's notebook entries, *see supra*, it could reasonably conclude in light of Berberich's notebook entries regarding the Slifka conversation that Belcher also participated, especially if we view the Slifka conversation in light of Berberich's notations made two days earlier (e.g., "promote crunch" and "press for default"). The long defendants point out that the conversation between Berberich and Slifka took place after Belcher had made its nominations, and argue that the entries merely refer to a discussion of whether there was going to be [a] default [sic]. However, the notes could more easily be interpreted as outlining the method of continuing the pressure that already had been placed on Apex. Thus, it reasonably could be inferred that the conversation consisted of more than mere speculation concerning Apex's ability to deliver. Accordingly, in light of all of the circumstances, including communications among the defendants and their parallel conduct, we must conclude that sufficient evidence has been produced from which a fact-finder could infer that Belcher, Global, and Northeast " 'had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.' " *International Distribution Centers*, 812 F.2d at 793 (quoting *Michelman*, 534 F.2d at 1043). We therefore reverse the dismissal of the antitrust claims as to Belcher

(27a).

For these same reasons, the Court of Appeals reversed the District Court's dismissal of the commodities manipulation claim as to Belcher. In all other respects, the judgment of the District Court was affirmed.

Reasons for Denying the Petition

I. The Petition Presents No Issue Upon Which Certiorari Should Be Granted, But Rather Seeks A Judicial Re-Evaluation Of The Evidence Presented

Petitioners seek to establish that summary judgment was erroneously denied in this antitrust conspiracy case due to what is variously described as a misapplication, violation and/or exception to this Court's rulings in *Matsushita* and *Monsanto*.[6] Petitioners attempt to avoid a jury trial by once again requesting judicial evaluation of the massive evidence presented, and by mischaracterizing the rule of law applied below to determine whether a genuine issue of material fact existed. Rather than supporting their cause, however, the petition serves only to underscore the existence of genuine issues of material fact that the Court of Appeals properly determined should be resolved by a trier of fact. Moreover, petitioners' strained interpretation of the decision below cannot overcome its plain text, which amply demonstrates that both *Monsanto* and *Matsushita*, as well as other applicable Supreme Court precedent, were properly recognized and applied.

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[6] *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). Petitioners do not specifically acknowledge the applicability of the *Monsanto* decision, but rather attribute the standards set forth therein to the *Matsushita* case. Although *Matsushita* restates the rule of law recognized in *Monsanto*, respondent Apex addresses these two cases separately, as did the Court of Appeals below, since distinct theories are discernible from each.

1. *Because* Monsanto *And* Matsushita *Were Properly Applied As To Petitioners, The Decision Below Is Consistent With The Rulings Of This Court And Decisions Rendered By Other Courts Of Appeal*

In a transparent attempt to elevate what are essentially result-oriented and factually based arguments to the level of "certworthiness," petitioners argue that the Court of Appeals failed to apply *Matsushita* and *Monsanto*, thereby placing itself not only in conflict with this Court but with other circuits as well.[7] This contention is nowhere supported in the decision. To the contrary the decision is manifestly based on the standards set forth by this Court in *Matsushita* and *Monsanto*.

In *Monsanto*, this Court held that evidence of dealership complaints alone was an insufficient basis upon which to infer a conspiracy in a dealer termination case. Rather, the Court held that evidence that "tends to exclude" the possibility of independent, and therefore, noncollusive action must be presented. 465 U.S. at 764. Thus, conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of conspiracy. *Id.* In *Matsushita*, the Court expanded on the *Monsanto* formulation by adding that, unless a plausible motive supports a finding that the alleged conspiracy is economically feasible, ambiguous conduct does not give rise to an inference of conspiracy. 475 U.S. at _____, 106 S. Ct. at 1348.

The court below clearly followed these precedents in setting forth the standard of review applied herein:

> While the non-moving party must show more than a "metaphysical doubt" as to material facts, *Matsushita*, [*supra*], all inferences must be drawn in favor of the nonmoving party. *Id.* at 1356-57. However, the

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[7] Petition For a Writ of Certiorari To The United States Court of Appeals For the Second Circuit, dated October 19, 1987 at 18-20 (hereinafter cited to as "Pet. at _____").

> Supreme Court has stated that "antitrust law limits the range of permissible inferences from ambiguous evidence in a §1 case." *Id.* at 1357. Specifically, "conduct as consistent with permissible conduct as with [an] illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.; See Monsanto,* [*supra*]. There must be some evidence that "tends to exclude the possibility that the [defendants] were acting independently." *Monsanto,* 465 U.S. at 764. Thus, evidence of parallel conduct alone cannot suffice to prove an antitrust conspiracy. A plaintiff "should present direct or circumstantial evidence that reasonably tends to prove that the [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Id.* . . .

(16a-17a).

This clear recognition of both *Monsanto* and *Matsushita* was also implemented through a painstaking and detailed evaluation of the "mass of material" presented by the parties (10a). This analysis resulted in the court's finding that the conspiracy was plausible, as required by *Matsushita* (18a-19a). The Court of Appeals also found that ample evidence "tending to exclude" the possibility of independent conduct had been presented, in accordance with *Monsanto.* It based this finding not merely on evidence of parallel conduct, but on the substantial evidence presented that petitioners' conduct resulted from a high level of interfirm communication and coordination, and a strong motive to enter into the conspiracy.[8]

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[8] Petitioners argue that the court below erroneously applied the "slight evidence" standard in reviewing their motion for summary judgment. Pet. at 14-15. While the Court of Appeals did acknowledge that standard, its decision concerning petitioners' participation in the conspiracy was based solely on the principles set forth by this Court in *Monsanto* and *Matsushita.* This result is clear from the text of the court's opinion as discussed above. Indeed, in the Apex Petition, see fn. 3 at 4, *supra,* it is demonstrated that although the Court of Appeals cited to the "slight evidence" standard, it did not apply that standard to the facts presented against *any* of the movants, including petitioners herein. Apex Petition at 20-24.

Even though it is obvious that the Court of Appeals in fact applied *Monsanto* and *Matsushita*, petitioners nonetheless maintain that an "exception" which "would empower the lower courts to dispense with the . . . clear rule in *Matsushita*" has been created (Pet. at 8). Finding no direct support for this fanciful conclusion in the decision below, petitioners apparently contend that the mere *result* in this case suggests that the court could not have applied *Monsanto* and *Matsushita*. This fallacious reasoning demonstrates that it is petitioners who have failed to analyze *Monsanto* and *Matsushita* properly. Neither case represents the virtual grant of immunity they desire.

Indeed, in *Monsanto* this Court specifically upheld the lower court's denial of a directed verdict despite its recognition of a "sharp conflict in evidence" which was susceptible of different interpretations. 465 U.S. at 769 n. 14. In direct contrast to petitioners' arguments herein, the Court in *Monsanto* held that "[t]he choice between two reasonable interpretations of the testimony properly was left for the jury". 465 U.S. at 767 n. 12. Consequently, even though the Court recognized that "[movant's] contrary evidence has force" the Court concluded that "we agree with the courts below that it was insufficient to take the issue from the jury." 465 U.S. at 768 n. 14.[9] The analysis of the Court of Appeals below is entirely based on and consistent with both *Monsanto* and *Matsushita* as is evident from a fair reading of the Court of Appeals' decision. Petitioners' strained attempts to manufacture a conflict, therefore, are to no avail and should be rejected.[10]

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[9] *Matsushita* contains no contrary analysis, but rather directs that where, as here, a plausible reason to conspire is demonstrated, the *Monsanto* formulation should be employed to determine whether a jury should be permitted to consider the merits of the claim. *See* 475 U.S. at ____, 106 S. Ct. at 1362 n. 21.

[10] It has been recognized that "[t]o justify a grant of certiorari, the conflict must truly be direct and must be readily apparent . . . ." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* ¶4.5, at 203 (6th ed. 1986). *See, e.g., Oregon Fish & Wildlife Dep't v. Klamath Tribe*, 473 U.S. 753 (1985); *United States v. National Bank of Commerce*, 472 U.S. 713 (1985); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923).

2. *Petitioners' Obvious Purpose Is To Engage This Court In A Lengthy Re-Evaluation Of The Evidence Considered Below*

The court below was required to assess what it described as a "mass" of evidence in deciding the motions for summary judgment before it (10a). Indeed, the record on appeal was over 6800 pages.[11] It is a desire for a re-evaluation of this totality of evidence that forms the true basis for the petition herein. Indeed, although petitioners disingenuously state that the opinion below was based on "two bits of evidence" (Pet. at 9), the petition itself constitutes little more than a factual re-hashing of the substantial evidence presented below.

In *Bourjaily v. United States*, _____ U.S. _____, 107 S. Ct. 2775 (1987), this Court recently reaffirmed the necessity for consideration of all evidence presented, and not simply a piecemeal review:

> [I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.

107 S. Ct. at 2781. Yet it is precisely a piecemeal review of the evidence that petitioners seek. Indeed, petitioners' main complaint appears to be that the court below rejected its *interpretation* of certain pieces of the evidence presented. It is axiomatic, however, that in reviewing the evidence, the court below was required to resolve all factual disputes in favor of Apex.

This Court's recent pronouncement in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 574, 106 S. Ct. 2505 (1986) bears repeating here, since it is nowhere acknowledged by defendants:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences

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[11] The eleven volume record on appeal was lodged with the Clerk of this Court, on October 17, 1987, in connection with a Petition for Certiorari filed by Apex on the same day. *See Apex Oil Co. v. DiMauro*, No. 87-633.

> from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. *The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.*

477 U.S. at _____, 106 S. Ct. at 2513 (emphasis added) (citations omitted). The most that can be said of petitioners' factual presentations to this Court is that they identify a host of underlying disputed issues of fact. Indeed, petitioners' factual arguments raise more questions than they claim to resolve. *See Monsanto*, 465 U.S. at 767 n.12 and 769 n.14 (holding that the case was properly sent to the jury despite "sharp conflict" in the evidence and that "[t]he choice between two reasonable interpretations of the testimony properly was left for the jury").

3. *Petitioners Seek Review Of A Denial Of Summary Judgment That Does Not Preclude Them From Presenting Their Arguments To A Jury Or To The Courts Following Any Adverse Judgment*

Petitioners' have failed to acknowledge the inescapable fact that the decision below has no final preclusive effect on their ability to vindicate their rights. Unlike a grant of summary judgment, the denial of summary judgment in no way prohibits petitioners from presenting the very arguments they assert here to a jury. In circumstances where there has been no final resolution of a case, this Court has indicated that a grant of certiorari is not generally appropriate. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R. Co.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *see also Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting). The complete absence of any issue of public importance or a conflict among the courts, coupled with the lack of preclusive effect of the decision below renders the Petition unworthy of this Court's consideration.

II. The Court of Appeals' Decision Is Wholly Consistent With The Decision In *Bourjaily*

In *Bourjaily*, this Court held that pursuant to Federal Rule of Evidence 801(d)(2)(E) a court, in making a preliminary factual determination that a conspiracy exists, may consider the very hearsay statements ultimately sought to be admitted upon that predicate finding. 107 S. Ct. at 2777. Thus, the Court rejected the contention that only independent evidence other than the statements sought to be admitted could be considered. *Id.*[12] The Court's decision primarily was grounded on Federal Rule of Evidence 104(a), which provides that in determining preliminary questions concerning admissibility a court "is not bound by the rules of evidence," thus permitting consideration of hearsay.

Petitioners maintain that the Court of Appeals decision is flawed because the evidence it relied upon in denying their summary judgment motion consisted *solely* of the uncorroborated Denihan notes. Petitioners' contention is wholly without merit as it is not supported by either the decision in *Bourjaily* or the decision below.

Indeed, petitioners apparently concede that *Bourjaily's* holding provides no support for their position whatsoever. They maintain, however, that the Court "*did not* hold that, in making the factual determination for purposes of Rule 801(d)(2)(E), a court may look *exclusively* to uncorroborated hearsay statements." (Pet. at 22) (emphasis in original). Whether or not

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[12] This contention was supported by the so-called "bootstrapping rule" of *Glasser v. United States*, 315 U.S. 60 (1942) and *United States v. Nixon*, 418 U.S. 683 (1974). Both *Glasser* and *Nixon* were decided prior to the enactment of Fed. R. Evid. 104(a).

the Court so held[13] is completely irrelevant to the decision of the court below.

Contrary to petitioners' totally misleading argument, the court below did not base its denial of summary judgment solely on the hearsay statements contained in the Denihan notes at issue. Rather, it was petitioners' *own* notes and communications with co-conspirators, as well as the totality of the evidence, that formed the basis for the Court of Appeals' decision. Indeed, the court below stated:

> If a finder of fact were to infer a conspiracy between Global and Northeast, a possibility we have concluded would be reasonable in light of Denihan's notebook entries, . . . it could reasonably conclude in light of [petitioners'] notebook entries regarding [a communication with a competitor] that [petitioner] also participated, especially if we view the [communication with the competitor] in light of [petitioners'] notations made two days earlier (e.g., "promote crunch" and "press for default")

(27a).

In this case, just as in *Bourjaily*, ample corroborating evidence of petitioners' participation in the conspiracy exists wholly independent of the hearsay statement at issue. Indeed, just as in *Bourjaily* such corroborating evidence was supplied in part by the petitioners' own conduct. Because this case presents no issue that is in any respect different from *Bourjaily*, and because it was decided below in accordance therewith, the petition should be denied.

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[13] In *Bourjaily* the Court stated:

> [I]t need not be decided whether, under Rule 104(a), the courts below could have relied solely upon . . . hearsay statements to establish the preliminary facts for admissibility.

107 S. Ct. at 2777.

Conclusion

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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